IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 201 of 1992

with

CRIMINAL REVISION APPLICATION No 47 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STATE OF GUJARAT

Versus

CHANDANSINH MADHUSINH SOLANKI

Appearance:

1. Criminal Appeal No. 201 of 1992

MR DESAI ADDL PUBLIC PROSECUTOR for Petitioner No. 1

MR MAGANBHAI BAROT, SR. ADVOCATE WITH

MR HRIDAY BUCH for Respondent No. 1

2. Criminal Revision Application No. 47 of 1992

MR MAGANBHAI BAROT, SR.ADVOCATE WITH

MR HRIDAY BUCH for Petitioner No. 1

MR DESAI ADDL PUBLIC PROSECUTOR for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 09/10/2002

COMMON ORAL JUDGEMENT

#. These two matters arise out of the judgment and order rendered by Additional Sessions Judge, Mehsana on February 7, 1992 in Criminal Appeal No.41/ 1991 confirming the judgment and order of Chief Judicial Magistrate, Mehsana in Criminal Case No.2719 / 1991 dated November 30, 1991 convicting the present revisioner and respondent in appeal for the offence punishable under Sections 170 and 419 of IPC and sentencing him to undergo R.I. for one year and to pay find of Rs.250/- in default to undergo a further R.I. for 15 days.

#. The revisioner has approached this Court against concurrent findings of conviction and sentence of the Courts below whereas, the appellant - State is before this Court seeking enhancement of the sentence imposed by the Court below.

#. The prosecution case in brief is that one Chhaganbhai Ambalal Prajapati of Mehsana lodged FIR with Mehsana City Police Station on 26th February, 1991 against the present revisioner stating that the revisioner had gone to his house on 10th February, 1991 while his wife Shardaben was alone at home and had impersonated as CID Inspector Mr.P.B.Patel and had demanded Rs.5,000/- from his wife. He had threatened that if money is not paid, they would be involved in a case. However, said Shardaben had paid Rs.150/- to him and he had left saying that he would return after some days. Thereafter, on 26th February, 1991 while the complainant was at his home and while Chaturbhai Ambalal Prajapati and Jayantibhai Vallabhbhai were present at his shop, the revisioner went to the shop and introduced himself as CID Inspector Mr.P.B.Patel. The complainant and his wife therefore went to the shop on being informed and found that he is the same person who had gone to the house of the complainant on 10th February, 1991. The complainant interrogated the revisioner and having found that his behaviour was suspicious, police was approached and complaint came to be lodged. The police apprehended revisioner and it was found during investigation that the revisioner was neither Mr.P.B.Patel nor was he CID Inspector as he introduced himself but he was in fact Chandansinh Madhusinh Solanki and was working in Legal Department in Secretariat, Gandhinagar. The police after conducting investigation, having found the evidence aginst the

revisioner filed chargesheet against him. Criminal Case No.2719 / 1991 came to be registered before the Chief Judicial Magistrate, Mehsana. Charge was framed against revisioner vide Exh.5. He pleaded not guilty to the charge and claimed to be tried. The prosecution led evidence and learned Chief Judicial Magistrate after considering the evidence led by the prosecution came to a conclusion that the prosecution was successful in establishing the charges against the accused. The learned Chief Judicial Magistrate therefore by his judgment and order dated 30th November, 1991 recorded conviction for the offence under Section 170 and 419 of IPC sentenced to undergo R.I. for one year and to pay fine of Rs.250/for each of the offence and in default to undergo R.I. for one month.

3.1 Aggrieved by the said judgment and order, the accused - present revisioner approached the Sessions Court with Criminal Appeal No.41 / 1991. The said Appeal came to be dismissed and the order of the CJM came to be confirmed by the judgment and order dated 7th February, 1992 which is the judgment and order impugned herein.

#. The revisioner in Criminal Revision Application No.47 / 1992 and the respondent in Criminal Appeal No.201 / 1992 is represented by learned Senior Advocate Mr.Barot who appears with learned advocate Mr.Hriday C. Buch.

4.1 Learned Senior Advocate Mr.Barot submitted that it is true that scope of criminal revision after two concurrent findings of the Courts below would be limited but when the State Government has approached this Court with an appeal seeking enhancement of sentence, this Court may not take a technical view and may examine the case on merits.

4.2 Mr.Barot submitted that if the facts of the case are seen, the entire episode is divided into two incidents, one incident is of 10th February whereas the second incident is of 26th February, 1991. Charge Exh.5 only refers to the incident 10th February, 1991 whereas the Courts below have convicted him for the entire episode. He submitted that both the Courts below have committed error in recording conviction of the revisioner overlooking the fact that the charge was only for the incident of 10th February, 1991. Mr.Barot submitted that therefore conviction is bad in law.

4.3 So far as the incident of 10th February, 1991 is concerned, Mr.Barot submitted that except the evidence of Shardaben, there is no other evidence to connect the revisioner with the offence. He submitted that for that incident, the complaint is lodged after 15 days on 26th February, 1991. In fact, neither the complainant, nor his wife were aggrieved by the incident but they have chosen to lodge a complaint only because something happened on 26th February, 1991. Had that incident not occurred, probably, no complaint would have been lodged. Mr.Barot therefore submitted that so far as the incident of 10th February is concerned, there is no material.

4.4 The revisioner would have no reason to get indulged into such activities. He was a Government employee. Explanation is given by the revisioner which may be considered by the Court sympathetically. The evidence of Sharadaben suffers from a large number of improvements and therefore, the conviction may be set aside.

4.5 By way of alternative submissions, Mr.Barot submitted that if this Cout is not inclined to accept the revision and confirms conviction, the revisioner may not be sent to jail and sentence may be reduced to the sentence already undergone by him or he may be given benefit of probation. Mr.Barot submitted that the revisioner has lost his job and has a grown up daughter to look after besides his wife. He is engaged in private firm and working as Accountant. Mr.Barot therefore submitted that these factors may be sympathetically considered.

#. Mr.Desai, learned APP has opposed this revision application and submitted that this Court may not exercise the revisional powers in a such case wherein a man who is himself a Government Employee working in the Legal Department, who can be presumed to know implications what he was doing, has committed an act with premeditation and therefore, the revision has no merits. The Courts below have unduly taken a lenient view and have imposed a relatively lighter punishment. Mr.Desai, learned APP therefore submitted that revision may be dismissed and sentence may be enhanced.

#. Having regard to the rival side contentions, it has to be noted that in the very peculiar circumstances of the case, even in order to appreciate the contentions raised by Mr.Barot regarding legal defect in the charge, this Cout will be required to examine the evidence and therefore, it would not be appropriate to throw away the

revision on technical ground of two concurrent findings of the Courts below, particularly, when enhancement appeal is also there, which also calls for examining the evidence to ascertain what could be quantum of punishment that can be said to be appropriate.

#. The charge is framed at Exh.5 and the substance of which can be stated thus ;

The accused went to the house of the complainant in Gitanjali Society at Mehsana at about 10.00 a.m. on 10th February, 1991 and impersonated himself as CID Inspector P.B.Patel knowing full well that he is not CID Inspector. He told the complainant's wife that there is case against them and that he has approached them for investigation. He took Rs.150/- from wife of the complainant and thereby committed an offence punishable under Section 419 and 177 of IPC. Thus, it is amply clear that the charge relates to the offence allegedly committed by the revisioner on 10th February, 1991.

#. The evidence of Chhaganbhai Ambalal Prajapati is recorded at Exh.7 who is complainant. He says that the incident occurred on 10th February , 1991. At that time he was not at home and he was at his shop and when he went home at about 2.00 p.m. he was informed by his wife that one P.B.Patel CID Inspector had come and told her that he has to arrest the complainant. He had then demanded Rs.5000/- from his wife and ultimately took Rs.150/- and went away. At that time, the accused had told his wife that his officer would approach them within fifteen days' time. On 26th February, 1991 the accused went to the shop of the complainant. At that time, Chaturbhai Ambalal Prajapati and Jayantilal Vallabhbhai were present. The complainant was at his home. Chaturbhai came to call him and therefore, the complainant and his wife both went to the shop. At that time, his wife identified the accused as person who had approached her on 10th February, 1991 at the residence. The complainant has identified the accused in the Court. He says that when identity card was demanded from him, he fumbled and therefore they informed the police and the accused was apprehended by the police. He says that he had lodged the complaint which is at Exh.8. The witness was cross examined. He says that he is Goldsmith and runs a shop for about eight years. The police has inquired / investigated against him for keeping stolen property. He also admits that inquiry regarding breach of Gold Control Act had also been made aginst him. He says that Sunday is weekly holiday for his shop. He also admits that 10th February, 1991 was Sunday. Jayantibhai

Vallabhbhai is his brother-in-law who is working in his shop and Chaturbhai is his brother and partner. He denies a suggestion that one Chandan has married with one Sombhai Durlabhbhai Joshi of Becharaji and she had fled away with ornaments of Rs.4,000/- along with cash and had got married. He denies a suggestion that those ornaments were sold by said Chandan to the complainant. He admits that he had not seen the accused prior to the incident. He says that the accused had approached his shop at around 3.00 / 4.00 p.m.. When he went to shop many persons had gathered. He says that the complaint was given by him at about 8.00 to 8.30 p.m.. He admits that in complaint he has stated "I am presenting him after apprehending him". Suggestions are put to him that the accused had approached them to inquire if they had purchased the ornaments sold by Bai Chandan. He also denies that complaint is lodged as counter blast to protect himself from being prosecuted.

#. Shardaben is examined at Exh.9. She says that on 10th February, 1991 the incident occurred between 10.00 to 11.00 a.m. The accused present in the Court had approached her at her residence after getting the door opened. After entering the house, he had introduced himself as Police Inspector P.B.Patel from Patan. The accused had inquired from her about her husband and she informed that her husband is not at home. The accused said that he is an Officer and he has to make an inquiry. The accused demanded Rs.5,000/- from her and she told him that she does not have money. They told her that if she wants the case to be hushed up, she will have to pay and therefore she paid Rs.150/-, upon which, the accused told her that Senior Officer will approach their shop on 20th for inquiry. The witness was told that her husband may be arrested. That her husband had gone out but when her husband returned at about 2.00 p.m. she told him about the incident. The accused had again come to the shop between 4 to 4.30 p.m. when her husband was at home, Chaturbhai had come to call him. Therefore, she also went along with her husband to the shop and identified the accused.

9.1 In cross examination, she admits that 10th February, 1991 was Sunday. She says that police had not interrogated her after lodging of the complaint by her husband. She admits that she is speaking for the first time in her deposition that when the accused came into house, he introduced himself as P.B.Patel from Patan. She also admits that she is saying for the first time in the Court that when he demanded the money, she told that she does not have money. She also admits that she said

for the first time in the Court that officer would go to the shop on 20th February for inquiry. She denies a suggestion that she has concocted the story about the accused having come to her house, having demanded the money and having given the treat.

##. Witness Chaturbhai Ambalal Prajapati is examined at Exh.10. He says that he knows complainant Chhaganbhai and his wife Shardaben. He says that the incident occurred on 10th February, 1991. He also says that he was cleaning the shop when Chhaganbhai went home in the evening. He says that Shardaben told him about incident. He said that one person had come from Patan and had introduced himself as CID Inspector P.B.Patel and had told Shardaben that he had gone there to make an inquiry and had then demanded Rs.5,000/-. He had said that there is a case about sale of ornaments. Shardaben was frightened and therefore paid Rs.150/-. She was threatened that if money is not given, Chhaganbhai would be arrested. He then says that on 26th February, 1991 while he and Jayantilal were at the shop, the accused came and told them that he was coming from Patan and that he is CID Inspector P.B.Patel. He said that he had gone to the shop for inquiry in respect of ornaments. The accused told that on 10th he had gone home but they were not there. The witness says that he therefore went home and informed Chhaganbhai and thereafter, Chagganbhai and his wife Shardaben came to the shop and Shardaben identified the accused as person who had gone to her house on 10th and had taken Rs.150/-. The accused was questioned and when the accused fumbled, the police was informed. The accused had one file which carried certain papers purported to have signed by Patan District Police Head. The police came and took away the accused.

10.1 In cross examination, the witness says that there was a raid regarding Gold Control and Inquiry was also made regarding purchase of stolen goods. He admitted to have stated in the police statement that "he is apprehended and produced before the police and Chhaganbhai had lodged the complaint".

##. Panch witness Kanubhai Patel was examined at Exh.11. He says that he was summoned at City Police Station on 26th February, 1991 at 9.05 p.m. and the other Panch was Pravinbhai. The accused was present. The panchanama about his physical condition was drawn by police and in that Panchnama, the Police had recorded the belongings seized by the police. There was one letter in the name of P.B.Patel purported to have signed by DSP, Patan, some photographs were there and some cash was also there. The

articles were seized by police. Identity card was also seized. He has been cross examined but no material comes out to help the defence.

##. The witness Khengarsinh Dilipsinh was examined at Exh.14. He says that he was in Mehsana City Police Station and had recorded the complaint in question given by Chhaganbhai Ambalal Prajapati. The accused was with him. He has been cross examined and admits the date and time of offence as indicated in the FIR is 10th February, 1991 at 10.00 a.m. whereas, the complaint is given on 26th February, 1991 at 21.00 Hrs.

##. The Investigating Officer - Sartanbhai Haribhai examined at Exh.16. He denies a suggestion that he has not recorded the statement of Shardaben. He admits that Shardaben had stated in her statement before him that she was scared and she said that he has gone out of town. She has stated before him that the accused told her that one person has sold ornaments to them.

##. Taking an overall view of the evidence in light of the contentions raised, what is found and what requires to be noted is that Charge - Exh.5 relates to the incident of 10th February, 1991. As such, if evidence is seen, no incident is has occurred on 26th February, 2002. No action is alleged to have been taken by the accused and he has not charged for any action of 26th February, 1991. He is charged and prosecuted for the incident of 10th February, 1991 only. It is only an incidental piece of evidence and conduct, something that transpired on 26th February is placed, considered by way of the evidence.

14.1 It is true that no action was taken either by the complainant or his wife regarding the incident of 10th February, 1991 till 26th February and rightly suggested, probably they would not have taken further action if the accused had not approached them again on 26th February, 1991 but that itself will not falsify the evidence regarding the incident of 10th February, 1991, it cannot exonerate the accused from the liability or responsibility that may be fastened on him because of his act on 10th February, 1991. On 26th February 1991, only action that is alleged against him that he went to shop and introduced himself as CID Inspector that promoted the brother of the complainant to call the complainant and complainant went to shop in company with his wife who identified the accused as person who had taken Rs.150/from her on 10th February, 1991. So, it cannot be said that he was tried or convicted for the incident of

26th February, 1991. He was charged, tried and is convicted for the incident of 10th February, 1991 only. The argument regarding defect in charge and consequent defect in trial and conviction, therefore, cannot be upheld.

##. Apart from the fact that there are concurrent findings of two Courts below, this Court has examined the evidence [even though this is Revision] in view of the fact that enhancement appeal is preferred by the State and it would be appropriate to examine the case to consider the sufficiency or insufficiency and propriety of quantum of sentence.

15.1 As stated above, it is amply clear from the evidence of Shardaben that the accused revisioner went to her house, posed himself as CID Inspector and took Rs.150/-. This aspect remains undented. It is true that some improvements are made by Shardaben in her deposition but so far as above aspects are concerned, the fact remains proved to the hilt. The exaggeration is made probably out of fear being disbelieved and branded as untrue witnesses. In this regard, observations made by the Hon'ble Supreme Court in para-15 in case of STATE OF U.P. Vs. ANIL SINGH reported in AIR 1988 SC 1998 may be profitably referred to. It would therefore be clear that there is no room for any interference in the judgment and order impugned herein by this Court so far as conviction is concerned.

15.2 It was vehemently contended that Shardaben's deposition deserves no credence as she has admitted in cross examination that she has stated implicating aspects for the first time before the Court. Thus, by necessary inference, her statement is not recorded by police. The evidence is therefore not reliable. However, this admission is a clear case of lack of understanding the question and implication of the answer. That has come to surface in deposition of Sartanbhai Haribhai, Exh.16, who denies suggestion that statement of Sharda was not recorded. More importantly, he accepts the suggestion that Shardaben has stated in her statement before him certain aspects. It therefore implies that statement of Shardaben was recorded.

15.3 It is true that complaint is late. But this is not unnatural. No businessman would like to indulge into prosecution unless the stake is high. The revisioner had taken Rs.150/- and gone away. His identity not known. And therefore merely the prosecution case cannot be doubted only because of delay. On the contrary, on

26-2-1991, immediate action is taken.

15.4 There are no other reasons indicated to doubt the deposition of Sharda.

##. The defence theory that revisioner had gone to inquire about purchase of stolen ornaments, does not seem probable or acceptable. He was a Government Servant and knew that introducing himself as CID Inspector is an offence. Besides this, if the intention was only an inquiry, he would not have demanded and accepted money from Shardaben.

##. Now coming to the question of sentence, learned Senior Advocate Mr.Barot submitted that the revisioner has undergone a sentence of 28 days and he may be awarded that much sentence instead of one year. Counter to this, learned APP Mr.Desai while arguing enhancement appeal has submitted that undue leniency is shown by the Courts below and therefore, punishment may be enhanced. Mr.Desai, learned APP submits that the punishment prescribed for the offence punishable under Section 419 of IPC is for three years or fine or both, whereas for the offence punishable under Section 170 of IPC, Law prescribes punishment of imprisonment for two years or fine or both.

##. The Courts below have taken into consideration the various aspects while considering the quantum of punishment. The only contention that is raised in this regard is that the accused has lost his job, that he has a family to support and he is now leading a spiritual life.

18.1 It may be noted that when the offence was committed, the accused was in Government employment working in Legal Department. He can be presumed to know what he was doing and what could be the consequences. He can well be presumed to have known, understood and anticipated that if he is caught, he is likely to lose his job, prosecuted and convicted. Family, of course, he had and he must have thought of the family before committing such an act. These grounds are too fragile to be considered sufficient for interfering with order of sentence passed in exercise of judicial discretion after considering relevant factors by both the Courts below, in exercise of revisional jurisdiction.

18.2 On the other hand, this Court finds that the incident in question is of 1991. It is almost 11 years

after the incident occurred. That by itself cannot mitigate the gravity. Equally, it is deemed not proper to interfere with quantum of punishment and enhance the same.

18.3 Keeping all these aspects in mind, there appears no reason to interfere with the quantum of sentence in any manner either by reducing it or by enhancing it.

##. The only question that now requires to be considered that grant of benefit of probation to the revisioner which has been heavily pressed by learned Senior Advocate Mr.Barot. Here again, the act of the revisioner as observed above was premeditated one. It cannot be said that it was committed on spur of the moment. He had all his wisdom behind him because he was aged about 41 years at the time when the incident occurred and in the opinion of this Court, therefore, grant of probation is also unwarranted.

##. In the result, the Revision as well as the Appeal, both must fail and are therefore dismissed. Judgment and order rendered by the Additional Sessions Judge, Mehsana in Criminal Appeal No.41 / 1991 dated 7th February, 1992, impugned herein, is confirmed. The revisioner shall surrender to the custody by 19th October, 2002.

Date : 9-10-2002 [A.L.Dave, J.]

#kailash#